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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
THE STATE OF NEW YORK,

Plaintiffs,

v.

HOOKER CHEMICALS & PLASTICS
CORP.; THE TOWN OF LEWISTON;
and THE TOWN OF NIAGARA,
(Hyde Park Landfill)

Defendants.

Civil Action No. 79-989(C)

STIPULATION AND ORDER ON PROCEDURES
CONCERNING INCINERATION OF HYDE PARK NAPL

The undersigned parties to the above-captioned action -- the United States of America ("EPA"), the State of New York ("State"), and Occidental Chemical Corporation ("OCC"), the corporate successor of Hooker Chemicals & Plastics Corp. -- hereby agree as follows:

1. On November 26, 1985, EPA/State and OCC filed with the Court a "Stipulation on Requisite Remedial Technology" ("RRT Stipulation"), an Agreement relating thereto and a Memorandum of Understanding relating to incineration of non-aqueous phase liquids ("NAPL") collected by remedial systems at the Hyde Park landfill pursuant to the RRT Stipulation and the Hyde Park Settlement Agreement approved by the Court in April, 1982 ("Settlement Agreement").

2. A collection system installed in 1978 in the overburden at the perimeter of the Hyde Park landfill has over the past two years collected an estimated average of approximately 2,000 gallons of NAPL per month. The NAPL collected by the existing system is pumped to storage facilities located at the Hyde Park landfill site. These facilities consist of two lagoons and four temporary bulk storage containers installed in 1984. The storage containers have no remaining capacity. It is estimated that capacity for storage of additional collected NAPL in the lagoons could be exhausted within one year. Therefore, in accordance with the Settlement Agreement, Addendum I, Subparagraph D(6), during the 1986 construction season OCC plans to initiate construction of an on-site permanent storage facility capable of storing approximately 160,000 gallons of collected NAPL. While this installation will provide interim relief, the Settlement Agreement and RRT Stipulation provide that on-site NAPL storage will be temporary and that NAPL collected and temporarily stored on-site must be transported off-site for incineration.

3. The RRT Stipulation requires that OCC install collection systems in the overburden and bedrock which are more extensive in depth and in areal coverage and which therefore are expected to collect significantly larger volumes of NAPL than the existing collection system. The Settlement Agreement and the RRT Stipulation do not require OCC to install or operate remedial systems which collect NAPL until there

are approved facilities available to incinerate the NAPL. If such incineration facilities become available and the Court has approved the RRT Stipulation, OCC is required to proceed as expeditiously as possible and plans to initiate installation and operation of collection systems required by the RRT Stipulation in mid-1987.

4. In view of the foregoing, unless approved facilities are available to incinerate Hyde Park NAPL by mid-1987, the off-site transportation and disposal of collected NAPL and plans to install and operate collection systems required by the RRT Stipulation will be delayed. The goal of the Settlement Agreement and the RRT Stipulation is to protect against endangerment to human health and the environment. A delay in the availability of facilities to incinerate Hyde Park NAPL by mid-1987 would interfere with the implementation of the Settlement Agreement and RRT Stipulation, and thereby jeopardize achievement of that goal.

5. Hyde Park NAPL contains a number of chemical compounds regulated under the Resource Conservation and Recovery Act ("RCRA") and the Toxic Substances Control Act ("TSCA") and state law, including Polychlorinated Biphenyls ("PCBs") and 2,3,7,8-Tetrachlorodibenzo-p-dioxin ("2,3,7,8-TCDD"). There are no incinerators within New York State which are permitted to accept Hyde Park NAPL or any other liquid wastes containing 2,3,7,8-TCDD. On a national level, no commercial incinerator has been permitted by EPA to accept 2,3,7,8-TCDD

wastes, and no other disposal technologies have been identified and demonstrated to be protective of human health and the environment in the management of 2,3,7,8-TCDD wastes. (See EPA, Hazardous Waste Management System; Land Disposal Restrictions (proposed), 51 Fed. Reg. 1602, at 1734 (Jan. 14, 1986).) OCC previously sought to contract with commercial incinerators to accept Hyde Park NAPL, but its efforts were unsuccessful.

6. If the existing hazardous waste incinerator at OCC's Buffalo Avenue plant ("OCC incinerator") is capable of performing in accordance with all applicable statutory requirements and regulatory requirements designed to protect human health and the environment, the OCC incinerator is the preferred facility for the incineration of NAPL collected by the Hyde Park remedial systems. The OCC incinerator is currently permitted to incinerate a number of chemical compounds, but these do not include PCBs over 50 parts per million (ppm) or detectable quantities of 2,3,7,8-TCDD. All of the major known organic components of the Hyde Park NAPL have been demonstrated to be capable of being destroyed by incineration, including the destruction of 2,3,7,8-TCDD to 99.9999% destruction and removal efficiency ("DRE"). Based on a review of the design of OCC's incinerator and governmental experience with incineration and subject to the receipt of additional data concerning inert particulate emissions, EPA/State is of the opinion that OCC's incinerator is capable of meeting the technical requirements of RCRA and TSCA and other applicable

statutes and regulations. In order to confirm that the OCC incinerator is capable of destroying Hyde Park NAPL in accordance with applicable statutory and regulatory requirements designed to protect human health and the environment, OCC must conduct trial burns (including, without limitation, stack testing).

7. (a) Three trial burns will be scheduled over a period of approximately four months; the burns themselves will last a total of about 144 hours. The first trial burn will use process waste generated at OCC's Niagara Falls plant currently incinerated pursuant to State permits and federal interim status authorization under RCRA, but the materials will not include PCBs at concentrations greater than 50 ppm or 2,3,7,8-TCDD; the second trial burn will use materials containing PCBs over 50 ppm; and the third trial burn will use NAPL from Hyde Park containing 2,3,7,8-TCDD and PCBs. The second trial burn will be conducted immediately after the first. The third trial burn -- involving NAPL from Hyde Park containing 2,3,7,8-TCDD and PCBs -- will be conducted only after the first two trial burns have been satisfactorily completed, as described in subsection (b) below, and the results thereof have been assessed by EPA/State and OCC. (This assessment is expected to be completed approximately two months after completion of the first two trial burns.)

According to the requirements of the TB plan.

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(b) The first two trial burns shall be deemed to have ~~been~~ satisfactorily completed, OCC's incinerator shall

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(be deemed capable of destroying plant process wastes and PCB wastes in accordance with applicable statutory, and regulatory requirements and ~~all~~ regulatory prerequisites for conducting the third trial burn involving materials containing 2,3,7,8-TCDD and PCBs will be deemed satisfied, if the following conditions are met during the trial burns:

(i) the RCRA trial burn has achieved 99.99% DRE for the three principal organic hazardous constituents (POHCs) designated in the trial burn plan described in subparagraph (d) -- tetrachloroethylene, carbon tetrachloride and hexachlorocyclopentadiene -- and this trial burn has satisfied all other applicable operating requirements specified in 40 C.F.R. § 264.343;

(ii) the PCB trial burn has achieved a DRE of 99.99% for PCBs and 99.9999% for trichloroethylene, and this trial burn has satisfied all the operating requirements specified in 40 C.F.R. § 761.70(a).

(c) The NAPL trial burn shall not be conducted unless and until the prerequisites described in subparagraph (b) have been satisfied. The NAPL trial burn shall be deemed to have been satisfactorily completed and OCC's incinerator shall be deemed capable of destroying 2,3,7,8-TCDD wastes in accordance with all applicable statutory and regulatory requirements, if the following conditions are met during the trial burn:

(i) the NAPL trial burn has achieved a DRE of 99.9999% for 1,1,1-trichloroethane and 99.99% for carbon tetrachloride; and

(ii) the NAPL trial burn has satisfied all of the operating requirements specified in 40 C.F.R. § 761.70(a).

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270.62(b)(6)

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(d) Subject to the public comment and environmental impact assessment processes described in Attachment A and Paragraph 11 below, EPA/State deem the trial burn plan for the OCC incinerator, dated February __, 1986, to be complete and in accordance with applicable statutes and regulations.

8. Data collected during the three trial burns will be utilized in the government's final determination concerning OCC's proposal to incinerate Hyde Park NAPL at the OCC incinerator. EPA/State will use their best efforts to enable a final determination to be made concerning all necessary governmental authorizations required to incinerate Hyde Park NAPL by August 1, 1987, unless such date is extended by agreement of the parties hereto¹¹ or by order of the Court. EPA/State also will not require OCC to utilize another facility to incinerate Hyde Park NAPL prior to August 1, 1987, unless such date is extended by agreement of EPA/State and OCC or by order of the Court; provided, however, that this limitation shall not apply if the circumstances described in the Memorandum of Understanding, ¶ 5 occur.

9. In order to assure compliance with the schedule described in paragraph 8, the first trial burn (RCRA) must be initiated by mid-May, 1986, and third trial burn (2,3,7,8-TCDD) must be completed by mid-September, 1986. If these trial burn dates were delayed, there would be consequential delays in determining whether or not OCC's incinerator is capable of destroying these materials in accordance with all applicable statutory and regulatory requirements designed to protect

human health and the environment and in issuing the required governmental authorizations. Specifically, if successful demonstration of the incinerator's capability were delayed, there could be no assurance that OCC would be able to obtain all necessary governmental authorizations required to incinerate Hyde Park NAPL at OCC's incinerator prior to the anticipated start-up date of remedial systems required by the RRT Stipulation. Likewise, efforts to locate an alternative facility and obtain governmental approvals to incinerate these materials would be seriously delayed by postponement of the trial burns if the trial burns demonstrate that the OCC incinerator is incapable of effectively destroying these wastes.

10. To enable governmental review and public comment processes to be completed on a schedule which would permit the first trial burn (RCRA) to be initiated by mid-May, 1986, and the third trial burn (2,3,7,8-TCDD) to be completed by mid-September, 1986, EPA/State and OCC will take the actions described in subparagraphs (a) and (b) below:

(a) Within 14 days after the filing of this Stipulation, the State Department of Environmental Conservation ("DEC") will issue to OCC a renewal of its air certificate to operate the OCC incinerator. Such renewal shall clarify that OCC may conduct trial burns to document the capability of OCC's incinerator to meet regulatory performance and DRE standards for materials containing 2,3,7,8-TCDD, Mirex, and PCBs greater than 50 ppm without a DEC permit modification,

provided that OCC submits to the DEC Division of Air Resources a satisfactory trial burn plan prior to conducting the testing.

(b) EPA/State and OCC will take all actions, consistent with their legal authority, necessary to assure compliance with the schedule set forth in Attachment A. To the extent that applicable statutes and regulations provide the parties with discretion to act, such actions shall be undertaken in a manner which is consistent with such schedule; provided, however, that nothing herein shall be construed to require any party hereto to act in a manner which is arbitrary and capricious or otherwise unlawful.

11. (a) The schedule set forth in Attachment A has been designed to secure expeditious governmental review and consideration of OCC's proposal to utilize its incinerator to destroy Hyde Park NAPL while at the same time assuring that the environmental impacts of the proposed action are thoroughly assessed and that there is appropriate opportunity for public comment and participation in the deliberative process. Attachment A sets forth the procedures which EPA/State and OCC will follow in processing OCC's request for EPA/State authorization to use OCC's incinerator to destroy wastes containing 2,3,7,8-TCDD and PCBs, and a schedule for compliance of the parties with these procedures. The Attachment sets forth the respective obligations of EPA/State and OCC and indicates the opportunity for public participation during the governmental authorization processes.

(b) No final action will be taken by EPA/State on the requested governmental authorizations unless and until OCC successfully completes each of the trial burns, as described in Paragraph 7.

(c) The references in this Paragraph 11 and in Attachment A to various statutes, regulations, and procedures are subject to the provisions of Paragraph 13 below. However, in order to resolve disputes among the parties regarding issues described in the Memorandum of Understanding and without admitting that the designated procedures are legally required, OCC has agreed to submit to DEC a proposed draft environmental impact statement ("DEIS"). The proposed DEIS will include a discussion of any environmental impacts associated with conducting the PCB and Hyde Park NAPL trial burns and long-term incineration of wastes containing 2,3,7,8-TCDD and PCBs. DEC will review those sections of the DEIS relating to the PCB and Hyde Park NAPL trial burns and provide notice of its availability to the public. A public comment period will follow. During this comment period, DEC will conduct a legislative hearing to receive comments from the public on the PCB and Hyde Park NAPL trial burns. At the close of the public comment period, DEC will review the comments received. The DEIS and the trial burn plan will be revised if so warranted in light of the public comments. DEC will then finalize the portions of the DEIS relating to the PCB and the Hyde Park NAPL trial burns which will be made available to the public for comment. Thereafter, DEC will issue a final decision regarding the

PCB and Hyde Park NAPL trial burns. Likewise, following the close of the public comment period, EPA will review and respond to comments received and will issue a final decision regarding all three trial burns.

(d) Those portions of the proposed DEIS that address the final EPA/State authorizations to use the OCC incinerator for the long-term incineration of wastes containing 2,3,7,8-TCDD and PCBs will also be made available to the public so that the public has the opportunity to comment on the scope of the DEIS. These sections of the DEIS will not be considered complete until after the trial burns have been completed and data relating thereto has been incorporated into the DEIS. The DEIS will then be made available to the public and another legislative hearing and a public comment period will be scheduled. If the Commissioner of DEC determines that substantive issues have been raised, the State will also conduct adjudicatory hearings concerning the requested governmental authorization. Thereafter, the DEC will proceed regarding the DEIS in the same manner as described in subsection (b) before issuing a final decision on OCC's requested authorization. Likewise, the EPA will solicit, review, and respond to public comments before issuing a final decision on OCC's requested authorization.

(e) The requested governmental authorizations described herein and in Attachment A shall not be deemed to require the convening of a Siting Board pursuant to 6 NYCRR Part 361.

12. In the event that any party hereto fails, or anticipates a failure, to take action in accordance with the schedule set forth in Attachment A, the Court and the other parties hereto shall immediately be so notified. In addition, in the event that any party hereto fails, or anticipates a failure, to take action in accordance with such schedule, any party hereto may petition the Court for such relief as may be appropriate in the circumstances including, without limitation, the relief described in subparagraph 8(d)(2) of the Settlement Agreement and subparagraph E(9)(c) of Addendum I of the Settlement Agreement.

13. Nothing in this Stipulation and Order shall be construed as an adjudication or determination of any legal issue or as a modification or waiver of the rights or legal positions of any party hereto on any issue arising in any subsequent proceeding before this Court pursuant to Paragraph 12 above, or in any other administrative or judicial proceedings, arising under any statute or regulation.

14. This Stipulation and Order shall become effective upon its approval and issuance by the Court.

[SIGNATURES OF COUNSEL]

APPROVED AND SO ORDERED:

UNITED STATES DISTRICT JUDGE